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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

In re:

PG&E CORPORATION

- and -

PACIFIC GAS AND ELECTRIC  
COMPANY,

Debtors.

- ☒ Affects Both Debtors  
☐ Affects PG&E Corporation  
☐ Affects Pacific Gas and Electric  
Company

Case No. 19-30088 (DM) (Lead Case)

Chapter 11

(Jointly Administered)

**SECURITIES LEAD PLAINTIFF'S LIMITED  
OBJECTION TO FOURTH MONTHLY FEE  
STATEMENT OF SIMPSON THACHER &  
BARTLETT LLP FOR ALLOWANCE AND  
PAYMENT OF COMPENSATION AND  
REIMBURSEMENT OF EXPENSES FOR  
THE PERIOD OF JULY 1, 2019 THROUGH  
JULY 31, 2019 [ECF NO. 4032]**

**Objection Deadline:** October 21, 2019  
4:00 PM

(No hearing set)

1 Public Employees Retirement Association of New Mexico (“Lead Plaintiff” or “PERA”),  
2 the court-appointed lead plaintiff in the securities class action captioned as *In re PG&E*  
3 *Corporation Securities Litigation*, Case No. 18-03509 (the “Securities Litigation”) pending in  
4 the U.S. District Court for the Northern District of California (the “District Court”), on behalf of  
5 itself and the proposed class it represents in the Securities Litigation (the “Class”), together with  
6 York County on behalf of the County of York Retirement Fund, City of Warren Police and Fire  
7 Retirement System, and Mid-Jersey Trucking Industry & Local No. 701 Pension Fund, hereby  
8 submit this limited and continuing objection (the “Limited Objection”) to the *Fourth Monthly*  
9 *Fee Statement of Simpson Thacher & Bartlett LLP for Allowance and Payment of Compensation*  
10 *and Reimbursement of Expenses for the Period of July 1, 2019 Through July 31, 2019* (the  
11 “Fourth Fee Statement”) [ECF No. 4032] filed by Simpson Thacher & Bartlett LLP (“Simpson  
12 Thacher”) in connection with its representation of certain defendants in the Securities Litigation  
13 who are current and former independent directors (the “Independent Director Defendants”) of the  
14 debtors in possession (the “Debtors”) in the above-captioned chapter 11 cases (the “Chapter 11  
15 Cases”). In support of this Limited Objection, Lead Plaintiff relies upon the declaration of Ty R.  
16 Sagalow submitted herewith (the “Sagalow Decl.”) and respectfully states as follows:

17 **PRELIMINARY STATEMENT**

18 Through its Fourth Fee Statement, Simpson Thacher seeks interim payment from the  
19 Debtors on account of at least \$28,741 of legal fees for services provided to certain of the  
20 Independent Director Defendants in connection with their defense in the Securities Litigation  
21 during the month of June 2019 (the “Disputed Fees”). Payment of the Disputed Fees on behalf  
22 of the Independent Director Defendants is impermissible because the Debtors’ alleged obligation  
23 to indemnify the Independent Director Defendants gives rise to, at best, unsecured prepetition  
24 claims subject to subordination pursuant to section 510(b) of the Bankruptcy Code. Payment of  
25 such claims during the Debtors’ bankruptcy cases violates the absolute priority rule and would  
26 prejudice Lead Plaintiff and the Class, whose claims are of greater or equal priority to the  
27 Independent Director Defendants’ alleged indemnification claims and are not anticipated to be  
28 paid in full as will the Debtors’ other, senior creditors. Further, Lead Plaintiff believes that

1 resolution of this issue can simplify and focus insurance coverage issues and therefore improve  
2 the chances of settlement of the Securities Litigation against the Individual Defendants.

3 On the other hand, denial of Simpson Thacher's request for payment of the Disputed Fees  
4 will not prejudice the Independent Director Defendants in any way or leave them without a  
5 source of payment for their defense costs. Under the terms of the Debtors' D&O liability  
6 insurance policies, the Independent Director Defendants' reasonable and necessary defense costs,  
7 are covered directly by substantial "Side A" insurance *from the first dollar* if the Debtors do not  
8 indemnify the Independent Director Defendants (which, as discussed below, they cannot). The  
9 Debtors, as debtors in possession, owe fiduciary duties to all creditors, including Lead Plaintiff  
10 and the Class. While the Disputed Fees in the Fourth Fee Statement may not yet be particularly  
11 significant in the context of this case, the Independent Director Defendants' legal fees in the  
12 Securities Litigation are certain to grow as the Securities Litigation proceeds. Squandering estate  
13 assets by paying legal fees where first-dollar insurance coverage is available, instead of pursuing  
14 payment from that insurance, contravenes those duties. Accordingly, the Court should enter an  
15 order (a) finding that the Debtors are prohibited, as a matter of law, from paying the Disputed  
16 Fees or any other defense costs incurred by the Independent Director Defendants or any other  
17 non-Debtor defendants in the Securities Litigation and (b) directing the Debtors and Independent  
18 Director Defendants to seek payment of reasonable and necessary fees from their D&O  
19 insurance carriers under the "Side A" coverage.

## 20 **BACKGROUND**

### 21 **A. The D&O Policies**

22 According to the Debtors, two towers of directors' and officers' liability insurance  
23 policies issued in 2017 and 2018 (the "D&O Policies") potentially provide coverage for the  
24 claims asserted against the Independent Director Defendants and other individual non-Debtor  
25 defendants in the Securities Litigation (collectively with the Independent Director Defendants,  
26 the "Individual Defendants").<sup>1</sup> See Decl. of Elizabeth Collier (the "Collier Decl.") [Adv. Pro.

27  
28 <sup>1</sup> Lead Plaintiff does not believe that coverage with respect to the Securities Litigation is  
limited to any one tower of D&O Policies and reserves all rights with respect thereto.

No. 19-03039, ECF. No. 3], ¶ 7. The D&O Policies provide three types of insurance coverage (“D&O Coverage”): (a) directly to the Individual Defendants, for losses that the Debtors do not indemnify (“Side A”); (b) to the Debtors, for losses they incur indemnifying the Individual Defendants (“Side B”); and (c) to the Debtors, for losses they incur on account of securities claims made directly against them (“Side C”). *Id.*, Exs. F and G, at 4.

**B. The D&O Policies provide Side A D&O Coverage directly to the Individual Defendants.**

The D&O Policies explicitly provide Side A D&O Coverage directly to the Individual Defendants, not to or through the Debtors. *Id.*, Ex. F and Ex. G, at 4 (“The INSURER *shall pay on behalf of the DIRECTORS and OFFICERS* all ULTIMATE NET LOSS for which the INSURED ORGANIZATION has not provided indemnification. . . .”). The D&O Policies further provide that, in the event the Debtors become subject to “FINANCIAL IMPAIRMENT” (a defined term that includes the commencement of these Chapter 11 Cases), “the INSURER shall pay on behalf of the DIRECTORS AND OFFICERS, under [*Side A*], ULTIMATE NET LOSS which would have been indemnified by the INSURED ORGANIZATION but for such FINANCIAL IMPAIRMENT.” *Id.* at 16-17.

**C. The D&O Policies have substantial coverage limits, including certain coverage available exclusively to the Individual Defendants.**

The 2017 and 2018 D&O Policies have aggregate coverage limits of \$250 million and \$300 million, respectively. *See* Decl. of Janaize Markland, [ECF No. 2472], ¶¶ 6, 8. Of that coverage, \$50 million (2017) and \$100 million (2018) is Side A difference-in-conditions coverage, which the Debtors have referred to as “D&O-dedicated insurance” because it is available exclusively to the Individual Defendants. *Id.* ¶¶ 6, 8.

All other coverage under all of the D&O Policies is subject to clauses that explicitly and fully subordinate all of the Debtors’ rights to seek any D&O Coverage under Side B or Side C to the Individual Defendants’ Side A D&O Coverage (the “Priority of Payments Clauses”). *See* Collier Decl., Exs. F and G, at 5-6 (section entitled “V. PRIORITY OF PAYMENTS” in 2017 and 2018 primary D&O Policies). The Priority of Payments Clauses explicitly provide that the D&O insurers must pay all claims under Side A before paying any claims under Side B or Side

1 C, which may be paid “only if and to the extent payment under [Side A] does not exhaust the  
2 applicable Limit of Liability.” These clauses also expressly provide that where the Individual  
3 Defendants incur claims under Side A, the Debtors, even if acting as debtors in possession,  
4 “*shall have no interest in or any claim for any payments under this POLICY until*” all claims  
5 under Side A have been paid in full. *Id.*, Exs. F and G, at 6. Only then, if any coverage remains,  
6 could the Debtors seek Side B or Side C D&O Coverage. *Id.*

7 **D. The Side A D&O Coverage has no self-insured retention.**

8 Under the express terms of the D&O Policies, the Side A D&O Coverage does not have a  
9 retention amount. *See* Collier Decl., Exs. F and G, at 2. Thus, even if the Debtors do not  
10 (because, as discussed below, they *cannot*) indemnify the Individual Defendants in connection  
11 with the Securities Litigation, the Independent Director Defendants have the immediate right to  
12 recover their reasonable and necessary defense costs directly from the insurers under the D&O  
13 Policies.

14 **E. The Simpson Thacher Retention Order**

15 By order entered May 10, 2019 (the “**Simpson Thacher Retention Order**”) [ECF No.  
16 1979], the Court authorized the Debtors to pay certain legal fees of Simpson Thacher as counsel  
17 to certain current and former independent directors of the Debtors, including but not limited to  
18 fees “with respect to (i) representation in ongoing litigation and regulatory inquiries, including  
19 matters involving the California Public Utilities Commission, (ii) fact-gathering, and (iii) related  
20 matters.” The debtors’ motion seeking approval to pay Simpson Thacher’s fees (the “**Simpson**  
21 **Thacher Retention Motion**” [ECF No. 1182] referred to certain pending litigation, regulatory  
22 inquiries, and criminal investigations and proceedings, *but made no mention whatsoever of the*  
23 *Securities Litigation*:

24 Simpson Thacher was first engaged in December 2017 to advise  
25 the Independent Directors regarding legislation concerning  
26 dividends and related issues. Simpson Thacher also has been  
27 representing the Independent Directors regarding alleged breaches  
28 of fiduciary duties and other claims arising out of the 2017 and  
2018 wildfires — including in pending derivative litigation which  
the plaintiff has asserted will not be stayed during the Chapter 11  
Cases. *See* Plaintiff’s Response to Nominal Defendants, PG&E  
Corporation, and Pacific Gas and Electric Company’s Notice of

1 Stay of Proceedings, *Bowlinger v. Chew et al.*, No. CGC-18-  
2 572326 (Supp. Ct. S.F. City and Country, Feb. 5, 2019). In  
3 addition, Simpson Thacher continues to advise the Independent  
4 Directors concerning their fiduciary duties.

5 Simpson Thacher Retention Motion at 4. The Simpson Thacher Retention Motion then  
6 described a number of ongoing regulatory inquiries and criminal proceedings. *Id.* at 4-5.  
7 Nowhere in this description of the matters for which the Debtor sought authority to pay Simpson  
8 Thacher did they indicate that Simpson Thacher intended to seek payment for defense costs in  
9 the Securities Litigation through this procedure. The only statement anywhere in the Simpson  
10 Thacher Retention Motion that could be even tangentially related to the Securities Litigation was  
11 a statement that “[t]he Independent Directors have requested that Simpson Thacher represent and  
12 advise them in connection with” a number of categories of issues, including “shareholder and  
13 securities-related issues including litigation[.]” *Id.* at 6.

14 At the hearing on the Simpson Thacher Retention Motion, counsel for Lead Plaintiff  
15 expressly reserved rights with respect to payment from the D&O Policies of any defense costs  
16 arising in connection with the Securities Litigation – yet, counsel for the Debtors gave no  
17 indication whatsoever that they intended to pay any such fees directly from their estates. The  
18 first time Lead Plaintiff learned that the Debtors intended to pay the Independent Director  
19 Defendants’ defense costs instead of appropriately seeking payment directly from Side A D&O  
20 Coverage was when the Debtors asserted as much in their reply in further support of their motion  
21 to enjoin the continued prosecution of the Securities Litigation against the Independent Director  
22 Defendants and other non-Debtors. *See Reply*, Adv. Pro. No. 19-03039 ECF No. 14, at 7. As a  
23 result, the Simpson Thacher Retention Order is ambiguous at best with respect to payment by the  
24 Debtors of the Independent Director Defendants’ defense costs in the Securities Litigation and,  
25 in any event, should not be construed in a manner that will allow the Debtors to violate  
26 bankruptcy law and their fiduciary duties as debtors in possession.  
27  
28

**F. The Fourth Fee Statement**

The following fifteen time entries in the Fourth Fee Statement, with a total billed amount of \$28,741.00, relate directly to the Securities Litigation:

Date	Professional	Narrative	Time	Amount
7/19/2019	Alcabes, Elisa	Re D&O insurance issues, review PERA opposition to motion to stay securities litigation (0.5).	0.50	\$ 610.00
7/20/2019	Alcabes, Elisa	Re D&O insurance issues, email PG&E (R. Reilly) re: PERA opposition (0.3).	0.30	\$ 366.00
7/21/2019	Alcabes, Elisa	Re D&O insurance issues, email P. Curnin and R. Perrin re: PERA opposition brief and call to discuss same (0.3).	0.30	\$ 366.00
7/22/2019	Alcabes, Elisa	Re D&O insurance issues, review/analyze D&O insurance policies re: arguments asserted in PERA opposition brief (1.0); email to P. Curnin and N. Goldin re: same (0.4); prepare for (0.3) and conference call w/ Weil (K. Kramer and others), P. Curnin, N. Goldin and Latham (R. Perrin) re: reply in further support of stay motion (0.5); follow-up t/cs w/ K. Kramer and N. Goldin re: same (0.4).	2.60	\$ 3,172.00
7/22/2019	Sparks Bradley, Rachel	Review filed opposition re: securities adversary proceeding (1.4); emails w/ N. Goldin and J. Calderon re: same (0.5).	1.90	\$ 2,080.50
7/23/2019	Calderon, Justin	Review securities plaintiffs' opposition to PG&E motion for preliminary injunction (0.9), incl. research of caselaw re: same (3.1).	4.00	\$ 2,800.00
7/24/2019	Alcabes, Elisa	Re D&O insurance issues, tc/email PG&E (R. Reilly) re: insurance issues for reply in further support motion to stay securities litigation (0.5).	0.50	\$ 610.00
7/24/2019	Sparks Bradley, Rachel	Emails w/ N. Goldin re: securities adversary proceeding (0.5); analysis re: same (0.4).	0.90	\$ 985.50
7/24/2019	Calderon, Justin	Further review securities plaintiffs' opposition to PG&E motion for preliminary injunction (0.5), incl. rsrch. of caselaw re: same (2.8).	3.30	\$ 2,310.00
7/29/2019	Alcabes, Elisa	Review/revise draft Reply in further support of stay of Securities Litigation re: D&O insurance arguments (4.7); tc/email company and team re: same (0.3).	5.00	\$ 6,100.00
7/29/2019	Calderon, Justin	Review and revise draft of reply brief ISO motion for preliminary injunction (2.8); email to R. Sparks Bradley re: same (0.2).	3.00	\$ 2,100.00



Date	Professional	Narrative	Time	Amount
7/29/2019	Sparks Bradley, Rachel	Review reply brief on adversary proceeding re: securities actions (0.9); emails w/ J. Calderon and E. Alcabes re: same (0.5).	1.40	\$ 1,533.00
7/30/2019	Alcabes, Elisa	Re D&O insurance, further revise draft Reply in further support of stay of Securities Litigation re: D&O insurance issues (1.0); email team re: same (0.3); email Weil team re: same (0.2).	1.50	\$ 1,830.00
7/30/2019	Calderon, Justin	Further review and revise draft of reply ISO motion for preliminary injunction (3.1).	3.10	\$ 2,170.00
7/31/2019	Alcabes, Elisa	Re D&O insurance, review revised draft Reply from Weil (K. Kramer) (0.7); prep mark- up re: same (0.5); email K. Kramer re: same (0.2).	1.40	\$ 1,708.00
			Total	\$ 28,741.00

See Fourth Fee Statement, Ex. D, pp. 28-30.

### **LIMITED OBJECTION**

Because any indemnification claims against the Debtors by the Independent Director Defendants are unsecured, subordinated, pre-petition claims, the Debtors *cannot* indemnify the Independent Director Defendants during the pendency of the Chapter 11 Cases, including by paying the Disputed Fees on their behalf. Instead, the Independent Director Defendants should be required to pursue insurance coverage for their reasonable and necessary defense costs directly from the available Side A D&O Coverage.

#### **A. The Independent Director Defendants' claims, if any, for payment of the Disputed Fees are prepetition claims.**

Any claims the Independent Director Defendants might assert for indemnification in connection with the Securities Litigation, including for payment of the Disputed Fees, are prepetition claims. *See, e.g., Siegel v. Federal Home Loan Mortg. Corp.*, 143 F.3d 525, 532-33 (9th Cir. 1998); *O'Loughlin v. County of Orange*, 229 F.3d 871, 874 (9th Cir. 2000) ("A claim arises, for purposes of discharge in bankruptcy, at the time of the events giving rise to the claim"); *The Official Comm. of Creditors Holding Unsecured Claims v. Painwebber Inc. (In re De Laurentiis Enter. Grp., Inc.)*, 124 B.R. 305, 308 (C.D. Cal. 1991) (claims for payment of attorneys' fees are a subset of indemnification claims). As a general rule, a claim is only entitled



1 to administrative expense priority if it arose from a postpetition transaction and substantially  
2 benefited the estate. *In re DAK Indus., Inc.*, 66 F.3d 1091, 1094 (9th Cir. 1995).

3 In *Siegel*, the Ninth Circuit discussed and relied upon its earlier holding, in *In re*  
4 *Christian Life Center*, 821 F.2d 1370 (9th Cir. 1987), that a postpetition indemnification claim  
5 based on prepetition services is a prepetition claim, not an administrative expense claim:

6 Although the legal fees expended in defending a corporate officer  
7 in *In re Christian Life* were actually incurred post-petition, we held  
8 that the claim arose pre-petition because the corporation's  
obligation to indemnify the officer arose from pre-petition  
services, i.e., it was a form of compensation.

9 In reaching that conclusion, we emphasized that "it makes no  
10 difference that the duty to indemnify the officer for litigation  
11 expenses . . . did not accrue until after the petition was filed when  
the officer incurred those expenses; ***the critical fact is that the***  
12 ***claim for indemnity arose from pre-petition services the officer***  
***provided the corporation.***"

13 *Siegel*, 143 F.3d at 533 (quoting *Christian Life Center*, 821 F.2d at 1374) (emphasis added); *see*  
14 *also In re Baldwin-United Corp.*, 43 B.R. 443, 454-56 (S.D. Ohio 1984) (prohibiting  
15 advancement of officers' legal fees as an administrative expense under an indemnity agreement  
16 for prepetition services).

17 This area of law is well-settled. *See, e.g., In re Huff Corp.*, 424 B.R. 295, 305 (Bankr.  
18 S.D. Ohio 2010) ("Courts 'have almost universally held that a contractual right to  
19 indemnification is a prepetition contingent claim if the contract was executed before the  
20 bankruptcy filing.'") (collecting cases); *In re Downey Fin. Corp.*, 428 B.R. 595, 601 n.16  
21 (Bankr. D. Del. 2010) ("Once an organization files for bankruptcy, the Bankruptcy Code  
22 prohibits the debtor from indemnifying the officers and directors on an ongoing basis. *See* 11  
23 U.S.C. § 362(a)(3)."); *In re Mid-American Waste Systems, Inc.*, 228 B.R. 816 (Bankr. D. Del.  
24 1999) (holding that the contractual claims of officers and directors for indemnity arose when the  
25 contract was executed and were therefore pre-petition, not administrative, claims); *In re*  
26 *Pennsylvania Truck Lines, Inc.*, 189 B.R. 331 (Bankr. E.D. Pa. 1995) (holding that a claim under  
27 a prepetition indemnification contract was a prepetition claim even though under applicable state  
28 law that claim did not accrue until after the petition date); *In re Amfesco Indus., Inc.*, 81 B.R.

1 777, 784-86 (Bankr. E.D.N.Y. 1988) (holding that current and former directors' claims for  
2 indemnification under a prepetition indemnification agreement were prepetition claims, not  
3 administrative expense claims, because the debtor's duty to indemnify arose from the directors'  
4 prepetition services and "[a]ll of the operative facts, legal relationships, and conduct of the  
5 Applicants upon which is based the threatened litigation occurred pre-petition").

6 The Ninth Circuit has reached the same result in the analogous context of a request for  
7 payment of postpetition attorneys' fees by a debtor pursuant to a provision in a prepetition  
8 contract, adopting a Bankruptcy Appellate Panel opinion holding that

9 "So long as the right to collect the fees existed pre-petition, the fact  
10 that the fees were actually incurred during the postpetition period  
11 is not relevant to the determination of whether the creditor has an  
12 allowable pre-petition claim for the fees." . . . Postpetition fees can  
13 be fairly contemplated when the parties have provided for them in  
14 their contracts and thus are contingent claims as of the petition  
15 date. . . . As stated by one leading commentator: "In general, if the  
16 creditor incurs the attorneys' fees postpetition in connection with  
17 exercising or protecting a prepetition claim that included a right to  
18 recover attorneys' fees, the fees will be prepetition in nature,  
19 constituting a contingent prepetition obligation that became fixed  
20 postpetition when the fees were incurred."

21 *In re SNTL Corp.*, 571 F. 3d 826, 843-44 (9th Cir. 2009) (quoting *In re New Power Co.*, 313  
22 B.R. 495, 508 (Bankr. N.D. Ga. 2004) and 5 COLLIER ON BANKRUPTCY § 553.03[1][i] (15th ed.  
23 2007)) (adopting B.A.P. opinion).

24 Here, all of the operative facts, legal relationships, and conduct underlying the Securities  
25 Litigation occurred prior to the Petition Date. The charter provisions and board resolutions  
26 pursuant to which the Debtors seek to indemnify the Independent Director Defendants were all  
27 executed fifteen or more years before the Petition Date. *See* Collier Decl., Exs. B (utility articles  
28 of incorporation dated April 12, 2004), C (PG&E Corp. articles of incorporation dated May 29,  
2002), D (utility board resolution dated July 19, 1995), and E (PG&E Corp. board resolution  
dated December 18, 1996). All of the Independent Director Defendants' conduct giving rise to  
the claims and causes of action asserted against them in the Securities Litigation occurred before  
the Petition Date.

1 Most importantly, any duty the Debtors may have to indemnify the Independent Director  
2 Defendants arises from their services as directors of the Debtors prior to the Petition Date. As a  
3 result, any indemnification claims the Non-Debtor Defendants might assert are ordinary,  
4 prepetition, unsecured claims subject to the same claims process as any other ordinary,  
5 prepetition, unsecured claims. *See, e.g., In re All Seasons Resorts, Inc.*, 79 B.R. 901, 904  
6 (Bankr. C.D. Cal. 1987) (the debtor's officers could "seek indemnification from [the] debtor, but  
7 their claim will be treated like any pre-petition, unsecured claim").

8 **B. The Independent Director Defendants' alleged indemnification claims are**  
9 **subordinated pursuant to section 510(b) of the Bankruptcy Code.**

10 The claims and causes of action asserted in the Securities Litigation all arise from  
11 purchases and sales of securities of the Debtors. Thus, any claims the Independent Director  
12 Defendants might assert against the Debtors for indemnification in connection with the Securities  
13 Litigation would be statutorily subordinated to all secured, administrative, priority, and  
14 unsecured claims against the Debtors pursuant to 11 U.S.C. § 510(b), which provides:

15 For the purpose of distribution under this title, a claim arising from  
16 rescission of a purchase or sale of a security of the debtor or of an  
17 affiliate of the debtor, for damages arising from the purchase or  
18 sale of such a security, ***or for reimbursement or contribution***  
***allowed under Section 502 on account of such a claim***, shall be  
subordinated to all claims or interests that are senior to or equal the  
claim or interest represented by such security, except that if such  
security is common stock, such claim has the same priority as  
common stock.

19 11 U.S.C. § 510(b) (emphasis added); *De Laurentiis*, 124 B.R. 305, 310 (C.D. Cal. 1991)  
20 (subordinating underwriter's claim for reimbursement of attorneys' fees incurred in defense of a  
21 securities action); *see also In re Touch Am. Holdings, Inc.*, 381 B.R. 95 (Bankr. D. Del. 2008)  
22 ("The plain language of this section is broad enough to include indemnification claims for both  
23 liabilities and expenses incurred on account of a claim for 'damages arising from the purchase or  
24 sale' of the debtor's or its affiliate's securities"); *In re Jacom Computer Servs.*, 280 B.R. 570,  
25 572 (Bankr. S.D.N.Y. 2002) ("[Section] 510(b) intends to subordinate the indemnification claims  
26 of officers, directors, and underwriters for both liability and expenses incurred in connection  
27 with the pursuit of claims for rescission or damages by purchasers or sellers of the debtor's  
28

1 securities.”); *In re Mid-American Waste Sys., Inc.*, 228 B.R. 816, 829 (Bankr. D. Del. 1999)  
2 (subordinating claims of debtor’s officers, directors, and underwriters for indemnification of both  
3 liability and expenses resulting from securities action by purchasers and sellers of the debtor’s  
4 securities).

5 Under Section 510(b), any indemnification claims the Independent Director Defendants  
6 might assert against the Debtors would be subordinated to all of PG&E’s secured and unsecured  
7 funded debt, all administrative expenses and priority unsecured claims, all unsecured trade debt,  
8 and all wildfire-related personal injury and property damage claims, all of which must be paid in  
9 full before the Independent Director Defendants would be entitled to payment of any of their  
10 alleged indemnification claims.

11 **C. The Disputed Fees should be paid only from Side A D&O Coverage, to the**  
12 **extent they are reasonable and necessary.**

13 As discussed above, the Independent Director Defendants’ alleged claims for  
14 indemnification from the Debtors are – at the very most – subordinated, unsecured, prepetition  
15 claims that are unlikely to be paid in full through any chapter 11 plan.<sup>2</sup> As such, those claims  
16 *cannot* be paid by the Debtors during the Chapter 11 Cases, including indirectly through  
17 payment of the Disputed Fees on behalf of the Independent Director Defendants. Where the  
18 Debtors do not indemnify the Independent Director Defendants (here, because they *cannot* due to  
19 their bankruptcy filing), the Side A D&O Coverage provides insurance coverage directly to the  
20 Independent Director Defendants, paying their reasonable and necessary defense costs from the  
21 first dollar without the need for the Debtors to pay one cent out of pocket. *See* pp. 3-5 above;  
22 Sagalow Decl. ¶¶ 12-14. Accordingly, the Court should (a) find that the Debtors are prohibited,  
23 as a matter of law, from paying the Disputed Fees or any other defense costs incurred by the  
24 Independent Director Defendants or any other non-Debtor defendants in the Securities Litigation  
25 and (b) direct the Debtors and Independent Director Defendants to seek payment of their  
26 reasonable and necessary fees from the Side A D&O Coverage under the D&O Policies.

27  
28 <sup>2</sup> Any potential indemnification claims may also be subject to disallowance if such claims  
remain contingent. *See* 11 U.S.C. § 502(e)(1)(B).

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## 20

21

1 Dated: October 21, 2019

**LOWENSTEIN SANDLER LLP  
MICHELSON LAW GROUP**

2  
3 By: /s/ **DRAFT**  
Randy Michelson (SBN 114095)

4 *Bankruptcy Counsel to Lead Plaintiff and the Class*

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**EXHIBIT B**  
**RESERVATION OF RIGHTS**

**This Limited Objection and any subsequent pleading, appearance, argument, claim, or suit made or filed by Lead Plaintiff, either individually or for the Class or any member thereof, do not, shall not, and shall not be deemed to:**

- a. constitute a submission by Lead Plaintiff, either individually or for the Class or any member thereof, to the jurisdiction of the Bankruptcy Court;**
- b. constitute consent by Lead Plaintiff, either individually or for the Class or any member thereof, to entry by the Bankruptcy Court of any final order or judgment, or any other order having the effect of a final order or judgment, in any non-core proceeding, which consent is hereby withheld unless, and solely to the extent, expressly granted in the future with respect to a specific matter or proceeding;**
- c. waive any substantive or procedural rights of Lead Plaintiff or the Class or any member thereof, including but not limited to (a) the right to challenge the constitutional authority of the Bankruptcy Court to enter a final order or judgment, or any other order having the effect of a final order or judgment, on any matter; (b) the right to have final orders and judgments, and any other order having the effect of a final order or judgment, in non-core matters entered only after de novo review by a United States District Court judge; (c) the right to trial by jury in any proceedings so triable herein, in the Chapter 11 Cases, including all adversary proceedings and other related cases and proceedings (collectively, "Related Proceedings"), in the Securities Litigation, or in any other case, controversy, or proceeding related to or arising from the Debtors, the Chapter 11 Cases, any Related Proceedings, or the Securities Litigation; (d) the right to seek withdrawal of the bankruptcy reference by a United States District Court in any matter subject to mandatory or discretionary withdrawal; or (e) all other rights, claims, actions, arguments, counterarguments, defenses, setoffs, or recoupments to which Lead Plaintiff or the Class or any member thereof are or may be entitled under agreements, at law, in equity, or otherwise, all of which are expressly reserved.**

**For the avoidance of doubt, Lead Plaintiff, on behalf of itself and the Class, does not, and will not impliedly, consent to this Court's adjudication of, including through any order of this Court purporting to adjudicate, release, waive, enjoin, or otherwise impact, the claims of Lead Plaintiff and the Class or any member thereof against any defendant now or hereafter named in the Securities Litigation.**